U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: May 23, 1989

CASE NO. 88-INA-43

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

FISCHER IMAGING CORP.
Employer

on behalf of

RICHARD JAMES WATTS
Alien

Robert G. Heiserman, Esq.
Milenia I. Soto, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, Guill, Tureck, and Williams, Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United Stated workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A82), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On November 7, 1986, the Employer filed an application for alien employment certification on behalf of the Alien to fill the position of engineering specialist (Electronics Design Engineer). (A31). The Employer is in the business of designing and manufacturing medical x-ray equipment. The job duties of the position included: designing and developing new products in diagnostic medical imaging field; modifying existing equipment; conduct analytical studies on engineering proposals; analyzing data to determine feasibility; preparing product layouts; building prototypes; utilizing multi-discipline engineering techniques; providing technical leadership and training. The Employer required 10 years experience in the occupation of product development in diagnostic medical imaging equipment. (A31).

On April 9, 1987, the CO issued a Notice of Findings. (A22-A25). The CO found that the job requirements were unduly restrictive under §656.21(b)(2). According to the CO, there is an implied requirement of education or vocational background to constitute an electronic engineer in addition to the 10 years of experience. Since, according to the Dictionary of Occupational Titles, the specific vocational preparation for the position includes up to 10 years, the Employer's experience requirement plus the implied educational requirement exceeds the D.O.T. (A23). The Employer was required to state the minimum education, training, and experience for a worker to satisfactorily perform the job duties. (A23). The CO found that since the job requirements were unduly restrictive, the Employer's recruitment efforts were deficient under §§656.21(b)(3), (b)(4), and (g)(1). (A24, A25). The CO found that the Employer's job requirements do not represent the actual minimum requirements for the job under §656.21(b)(6). According to the CO, the Alien's background indicates early vocational preparation which may have caused the employer to write its requirements around the qualifications of the alien. (A24). The Employer was required to document that its requirements conform to the regulations. (A25). Finally, the CO found that the Employer must document that U.S. workers were rejected for lawful, job-related reasons under §656.21(b)(7). (A25).

On May 14, 1987, the Employer filed rebuttal. (A8-A21). The Employer stated that the CO's findings of an implied educational requirement was unfounded, without factual basis, and

speculative. (A8). The requirement of 10 years of experience does not exceed the D.O.T. The Employer further argued that experienced engineers qualify for some positions without being degreed, and that the State of Colorado permits non-degreed engineers to be licensed on the basis of 10 years experience. (A8-A9). An occupational outlook handbook and state regulations were submitted in support. (A15-A20). The Employer also argued that the Alien met the minimum requirements for the position prior to being hired by the Employer. (A11). The Employer concluded that the requirements for the position were not unduly restrictive and were the actual minimum requirements for the job; therefore, its recruitment efforts were not deficient. Finally, the Employer stated that after its recruitment efforts, it stated reasons for rejecting each U.S. applicant, and the each applicant did not meet the minimum requirements for the job. (A12).

On September 4, 1987, the CO issued a Final Determination denying labor certification. (A3-A5). The CO found that the Employer failed to document that the job requirements were not unduly restrictive. (A4). According to the CO, the Employer's failure to state specific educational training was occasioned by the alien's lack of a degree in electronic engineering. (A4). The CO determined that the Employer has tailored the requirements to match the qualifications of the Alien. (A4).

> The real question is whether or not the employer would reject an applicant with a BSc or MSc and 5 or 6 years experience. The Employer does not address this issue which would possibly include the greatest number of applicants because most engineers are degreed, yet no alternative to the requirements has been advanced. (A5).

The CO also found that since the Employer did not amend its requirements, or document that they are its true requirements, the remaining findings of the Notice of Findings were not rebutted, i.e., §§656.21(b)(3), (b)(4), (b)(6), (b)(7), and (g)(1). (A5).

On September 30, 1987, the Employer requested review. In its request for review and brief on appeal, the Employer argued that it has complied with the regulations, has not described the job with unduly restrictive requirements, and has conducted extensive recruitment efforts. According to the Employer, its requirements are essential for the operation and safety of its business. The Employer argues that the CO abused her discretion by providing instructions for the first time in the Final Determination, specifically, that the employer did not address whether it would reject a U.S. applicant with a BSc or MSc and 5 or 6 years experience.

Discussion and Conclusion

The CO denied certification on the ground that the Employer's requirements were unduly restrictive. Since the Employer refused to amend the application to include a combination of education, training, and/or experience which would qualify an individual to satisfactorily perform the job, the job opportunity has been described with unduly restrictive requirements in violation of §656.21(b)(2). Cf. In Re Enhanced Performance Associates, 87 INA 708 (Apr. 13, 1988); In Re Danby-Palicio, 87 INA 530 (Mar. 21, 1989).

The Employer's evidence in rebuttal, while tending to establish that an individual with 10 years experience and no degree would qualify, does not establish that an individual with a degree and less than 10 years experience would not qualify for the position. Therefore, the Employer has not demonstrated that the job opportunity has been described without unduly restrictive requirements.

On appeal, the Employer argues that the specific instructions to show what combination of education and experience would be sufficient to qualify, first appeared in the Final Determination. The CO, in the Final Determination, identified that "the real question is whether or not the employer would reject an applicant with a BSc or MSc and 5 or 6 years experience." However, the CO, in the Notice of Findings, required the Employer to state the minimum education, training, and experience for a worker to satisfactorily perform the job duties. We find that the Notice of Findings gave the Employer adequate notice of the issue involved, and does not excuse the Employer's failure of proof on rebuttal. Accordingly the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby, AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

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